The End of the Road for Walton

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The end of the road for *Walton*

The Supreme Court's decision in *Walton v Scottish Ministers*[1] marks the end of the legal challenges to the building of the Aberdeen Western Peripheral Route. After decades of planning, proposals and debate we are now closer to relief for those who have spent too much of their life stuck in traffic on Anderson Drive in Aberdeen, and, of course, to major upheaval and disruption for those affected by the new route. This note will not consider the practical impact of the decision, but rather seeks to draw attention to four points arising from what was said in the Supreme Court. First, there is the resolution on the substantive issue of when a further strategic environmental assessment is required if there are changes after a plan has been approved. Then there are two issues affecting the law on judicial review and equivalent statutory review mechanisms, concerning standing and the discretion of the courts. Here there are suggestions of a shift away from the threshold issue of standing as the dominant stage for considering whether a case is appropriate for the court's intervention and towards greater discretion at the stage of remedies. Finally there are some observations about the cases that make their way to the Supreme Court.

The background to the case is the process by which the long-standing ideas for a by-pass to the west of Aberdeen crystallised into specific approvals for building new roads. A firm proposal for a Western Peripheral Route was included in the non-statutory regional transport strategy produced by the North East Scotland Transport Partnership (NESTRANS) in 2003, after which the Scottish Ministers announced that the new road would be promoted as a trunk road. After various consultations, draft road schemes were produced in 2006 for a route different from the options considered earlier. These draft schemes were subject to a public inquiry, but the scope of this was limited to exclude consideration of the economic, policy or strategic justification of the road. The inquiry reported in June 2009 and in January 2010 the Ministers made the draft orders for the new roads which were approved by the Scottish Parliament in March 2010. Using the statutory review procedure under the Roads (Scotland) Act 1984, these orders were challenged on various grounds and by various parties, but what emerged[2] was a challenge in the name of one objector, William Walton, who was unsuccessful in the Outer House[3] and again in the Inner House[4] where a narrower set of grounds was pursued.

Strategic Environmental Assessment

Before the Supreme Court there were two substantive challenges to the procedure leading to the orders, but one, claiming that the limited remit of the inquiry breached a common law duty of fairness, was summarily dismissed.[5] The argument that was given detailed consideration was whether the changes between the initial strategy and the finally approved orders were such as to require a strategic environmental assessment (SEA) of the modified

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[1] [2012] UKSC 44. Lords Reed, Carnwath and Hope delivered substantive judgments with Lords Kerr and Dyson concurring with all of them.

[2] The earlier proceedings involved an application for a protective expenses order by a pressure group; *Road Sense v Scottish Ministers* [2011] CSOH 10; 2011 SLT 889.

[3] [2011] CSOH 131; M. Mackay, "The Aberdeen Western Peripheral Route ('AWPR') – statutory appeals" (2011) 147 SPEL 112.

[4] [2012] CSIH 19; M. Mackay, "AWPR Inner House appeal refused" (2012) 150 SPEL 44.

[5] [2012] UKSC 44 paras 72-73 (Lord Reed), 100-101 (Lord Carnwath, who noted the failure of a complaint on similar grounds before the Compliance Committee established under the Aarhus Convention) and 150 (Lord Hope, also noting the Aarhus conclusion).

proposals, under the terms of the SEA Directive.[6] The Directive requires such an assessment for various "plans and programmes" and expressly applies where there is a modification to such plans.[7] Did the emergence of a different scheme from the one envisaged in the regional transport strategy mean that there had been a modification of the plan such that a new SEA was required?

Two potentially complicating factors can be put to the side. The first is timing, since although the initial strategy was made before the SEA Directive took effect, the changes fell after the date for implementation.[8] The second is whether in view of the non-statutory nature of NESTRANS and its strategy, the relevant plans were indeed "plans and programmes" which fell within the scope of the Directive, essentially those "which are required by legislative, regulatory or administrative provisions" and which "set the framework for future development consent".[9] The Supreme Court was content to leave this question unanswered but to proceed on the basis that the plans here were included, although suggesting that if forced to reach a decision on this point it might have gone the other way.[10]

On the main issue it was held that the revisions should not be seen as changes to the overall plan or programme, but rather as affecting a project which was implementing that plan. EU law has created two systems for examining the environmental consequences of proposals, making a distinction between environmental impact assessment for individual projects[11] and SEA for plans and programmes. The background is that initially only projects were subject to any assessment[12] but it was recognised that this left a gap in considering the environmental consequences of proposals since whether a project should go ahead at all and major elements of what was to be done were often determined in advance by a higher plan that was no longer subject to reconsideration by the time the details of a specific project came to be assessed. This gap was filled by the subsequent adoption of the SEA Directive. The change of route and other adjustments to the proposal for the Aberdeen Western Peripheral Route were properly seen as alterations to an individual project rather than as modifications to the framework within which future development would take place; there was not a modification to the plan and therefore no need to carry out a further SEA and the procedure adopted was not unlawful.[13] This conclusion was seen as consistent with a purposive interpretation of the relevant legislation, observing the distinction between the two forms of assessment but leaving no gaps, since the effects of the revised scheme on the environment were covered by the environmental impact assessment to which the new road was subject as a project that helped to give effect to the plan.

There are inevitably going to be boundary issues between "plans and programmes" and "projects", further complicated by the need for an "appropriate assessment" of "any plan or project" that might adversely affect a site designated under the Habitats and Species Directive.[14] Given the endless variety of plans, programmes, strategies, schemes and proposals produced by public authorities, difficulties will arise and the emphasis on whether a

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[6] Dir. 2001/42/EC, implemented in Scotland primarily by the Environmental Assessment (Scotland) Act 2005.
[7] Ibid., art.2(a).
[8] [2012] UKSC 44 at paras 63 (Lord Reed) and 148 (Lord Hope).
[9] Dir. 2001/42/EC, arts 2(a) and 3(2)(a).
[10] [2012] UKSC 44 at paras 62-63 (Lord Reed), 99 (Lord Carnwath), 149 (Lord Hope).
[11] Now under Dir.2011/92/EU, codifying earlier legislation.
[12] Under Dir.85/337/EEC.
[13] [2012] UKSC 44 at paras 66-69 (Lord Reed), 99 (Lord Carnwath), 149 (Lord Reed).
[14] Dir.92/43/EEC, art.6(3); see *Commission v UK* (C-6/04) [2005] ECR I-5261, esp. paras 51-56 in relation to land use plans.

document is setting the framework for other decisions seems an appropriate focus for distinction. Above all, though, what matters is that no gap is left and that however they are categorised, all proposals are subjected to a proper assessment of their effects on the environment before binding decisions are made.

Standing and Discretion

Of more general interest are the Court's observations on standing and discretion, which follow the lead set in *AXA General Insurance Limited v Lord Advocate*[15] in marking a distinct shift in Scots law. In *AXA* the Supreme Court stated that the traditional approach in judicial review cases of requiring title and interest to sue should be abandoned in favour of a more general test of sufficient standing.[16] Here, since it was a statutory challenge, the standing test required the litigant to be a "person aggrieved"[17] and again the need to avoid a restricted view was stressed. It was held that it is not only a person whose interests are prejudicially affected who should be regarded as being aggrieved[18] and in particular that a person who has participated in the procedure leading to a decision should normally be entitled to make a challenge on the basis that the decision has not been properly made. Making objections or representations at the appropriate stage in the procedure is not, however, an absolute requirement, e.g. the alleged procedural flaw may be a misdescription of the project leading to a party not participating,[19] but this will ordinarily be a relevant factor.[20]

In view of comments in the Inner House about Mr. Walton's standing under the standard test for judicial review, this too was considered. Lord Reed repeated his own words and those of Lord Hope in *AXA*, emphasising that although busybodies are to be excluded:

> "there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it."[21]

In referring to the importance of vindicating the rule of law Lord Reed here is echoing a point made in leading English cases where the need to take a broad view of standing has been stated.[22]

Lord Hope made further comments specifically about environmental cases, noting that environmental law proceeds on the basis that "the quality of the natural environment is of legitimate concern to everyone". [23] Some cases may involve an impact on private

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[15] [2011] UKSC 46.
[16] A. Page, "'Not law that the courts will recognise' – *AXA* in the Supreme Court" 2012 JR 225, pp.230-233
[17] Roads (Scotland) Act 1984, Shed.2 para.2.
[18] [2012] UKSC 44 at para. 85 (Lord Reed).
[19] As in *Cumming v Secretary of State for Scotland* 1992 SC 464.
[20] [2012] UKSC 44 at para. 87 (Lord Reed).
[21] Ibid., para.94.
[22] *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617 at 644 (Lord Diplock); *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd.* [1995] 1 WLR 386 at 395 (Rose LJ).
[23] [2012] UKSC 44 at para. 152.

interests, but others will not, e.g. those involving disturbance to wildlife,[24] yet there should be someone able to invoke the law. Anyone coming to court must demonstrate a genuine interest in the environmental issue, and sufficient knowledge to qualify them to act in the public interest. Normally one would expect either a government agency or an established NGO to take the lead. Yet, there must be room for individuals "who are sufficiently concerned, and sufficiently well-informed" to raise actions.[25] The Supreme Court is thus confirming the more generous approach to standing stated in *AXA* and disavowing the restrictive attitude shown in the Court of Session at the earlier stages of this case and in other recent cases.[26]

More noteworthy, perhaps, are the very explicit statements about the place of standing and the role of discretion in deciding the final outcome of a case. In England, standing has been viewed not as a free-standing threshold issue but as something to be examined in conjunction with the merits and particularly in deciding how the discretion whether to grant any remedy should be exercised.[27] By contrast, in *Scottish Old People's Welfare Council, Petitioners*[28] Lord Clyde had expressly rejected the view that standing and merits should normally be considered together, saying that:

> "the matter of locus standi is logically prior to and conceptually distinct from the merits of the case. It is properly of a preliminary character even although there may be cases where it cannot be resolved without inquiry into the merits."[29]

At the same time, although the discretion of the court has been recognised, some cases have suggested that once a legal flaw has been found, the discretion to refuse a remedy should be very sparingly exercised, as in *Hanlon v Traffic Commissioners*[30] where Lord Prosser quoted with approval the view of Lord Inglis that:

> "For the Court to abstain from enforcing a right because that enforcement would cause great inconvenience or pecuniary loss to somebody else is a doctrine which is quite unknown to the law of Scotland."[31]

There have been cases more willing to view standing and merits as interlinked and to assert the discretion of the courts,[32] but here both Lord Reed and Lord Hope make this point more explicit. The former says:

> " ... the interest of the particular applicant is not merely a threshold issue, which ceases to be material once the requirement of standing has been satisfied; it may also bear upon the court's exercise of its discretion as to the remedy, if any, it should grant in the event that the challenge is well-founded."[33]

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[24] Ibid.; the example he gives is of development impeding an osprey's access to its fishing loch.
[25] Ibid., para.153.
[26] E.g., *Forbes v Aberdeenshire Council* [2010] CSOH 1, *McGinty v Scottish Ministers* [2011] CSOH 163.
[27] *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617.
[28] 1987 SLT 179.
[29] Ibid. at p.187.
[30] 1988 SLT 802 at 804; see also *Tayside Regional Council v British Railways Board* 1993 TLR 670 where Lord Prosser is reported as saying that there had to be "very cogent reasons" for depriving a litigant of the ordinary means of enforcing legal rights.
[31] *Bank of Scotland v Stewart* (1891) 18 R 957 at 971.
[32] E.g. *Gordon v Kirkcaldy District Council* 1998 SLT 507, *Bett Properties Ltd v Scottish Ministers* 2001 SLT 1131 (standing and merits); *King v East Ayrshire Council* 1998 SLT 1287, *Ingle v Ingle's Trustee* 1999 SLT 650 (discretion as to remedy).
[33] [2012] UKSC 44 at para.95.

The latter states that concern about the balance of interests and about allowing standing to parties who do not themselves suffer substantial prejudice can be met at this later stage of deciding whether to grant any remedy.

Such comments suggest that the more expansive view of standing being urged on the Scottish courts by the Supreme Court is to be offset by a more active consideration of whether the balance of interests requires a remedy even if a legal flaw is discovered. The outcome may therefore remain disappointing for the unsuccessful challengers allowed to present their case but denied a remedy even though it is established that the correct procedure has not been followed. Nevertheless it is probably better for this to be the result of an explicit balancing of interests after recognising the existence of a legal flaw than for concern over the practical consequences of a successful challenge to lead to cases being halted by a narrow application of technical rules on a threshold issue.

The court's discretion is also the subject of the bulk of Lord Carnwath's judgment. From his interesting and detailed analysis of the position under specific provisions for statutory review procedures, for judicial review and where it is claimed that EU law has been breached, two points can be highlighted. The first is his conclusion, which Lord Hope expressly agreed with, that the fact that a party has shown that a breach of EU law has occurred does not deprive the court of its discretion whether a remedy should be awarded. Comments from *Berkeley v Secretary of State for the Environment (No.1)*[34] which had been taken as suggesting that the court had no option but to ensure full compliance with EU law had to be read in the context of that specific case.

> "[T]he public interest in nullifying an action taken in breach of European law is not absolute, and … the remedy may in some circumstances be tailored to the extent of the practical damage, if any, suffered by a particular applicant."[35]

Thus, although the effective enforcement of the law must be secured, a finding that EU law has not been complied with in the procedure leading up to a decision does not automatically mean that that decision must be quashed and the court continues to exercise discretion as in purely domestic cases.

The second point to note is his more speculative consideration of what would happen if in a case like this the orders approving a scheme were quashed. He points out that quashing the final order following a challenge under the statutory review procedure does not necessarily mean that everything that has gone before should be regarded as annulled, requiring the whole process to go "back to square one". "How much can be salvaged from the earlier procedures will no doubt depend on the nature of the breach, and how it can effectively be remedied",[36] he says before calling for statutory reform "to provide a more flexible and coherent range of powers" in the operation of statutory review procedures, akin to those available in judicial review.[37] There is thus a clear desire to have a more flexible and discretionary process, whereby the legal position can be asserted whilst avoiding the worst extremes of procedural flaws with minor practical impact causing major delay and disruption to decisions or projects that have a significant impact on large numbers of other people.

Access to the Supreme Court

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[34] [2001] 2 AC 603.
[35] [2012] UKSC 44 at para.135.
[36] Ibid., para.144.
[37] Ibid., para.145.

The final element to highlight from the case are some comments about the appropriateness of this appeal reaching the Supreme Court. At the start of his judgment, Lord Hope goes out of his way to say that the issue of the need for an SEA "raised a question of some difficulty which it was proper for this court to consider."[38] As he notes, this case had generated strong expressions of frustration in many quarters[39] over the delays that the legal challenges were causing and personal criticism of Mr. Walton's determination to pursue the case to the end.[40] These comments may therefore be seen as an attempt to reassure the losing side that they did have respectable grounds to maintain their challenge and to persuade the wider public that continuation of the case was reasonable.

Yet there is a more legal context which may also be significant. Whereas leave from the Appeal Court or the Supreme Court itself is necessary for cases from the other UK jurisdictions before they can reach the Supreme Court, no such leave is necessary from Scotland. This was discussed in the last years of the House of Lords in *Wilson v Jaymarke Estates Ltd.*[41] where Lord Hoffman doubted whether the appeal coming from the Court of Session actually raised a point of law.[42] In that case Lord Hope explored the issue more fully,[43] noting the privileged position for Scottish appeals and observing that "the limits on it must be carefully and jealously respected if it is to continue to be in the public interest, noting the amount of appellate business that now comes before the House from all parts of the United Kingdom."[44] That this advice is not always being heeded was clear earlier in 2012 when in *G Hamilton (Tullochgribban Mains) Limited v Highland Council*[45] the unanimous judgment of the Supreme Court given by Lord Walker stated that:

> "[This case] is not an appeal for which permission would have been given by this Court, had permission been necessary. It does not raise any point of law of general importance, and the judgments below set out the position clearly and correctly."[46]

If the *Walton* case had been the waste of time that some of the (non-legal) critics had suggested, then a further example of a worthless case consuming the resources of the Supreme Court might have increased the pressure for change, and for the introduction of a leave requirement for Scottish appeals. Lord Hope makes it clear that this was a case worthy of the highest court's attention. So long as the *Tullochgribban* case remains an isolated example, the status quo may survive, but the warning given in *Wilson v Jaymarke Estates Ltd.* should be kept in mind.

Conclusion

Whilst to most people the importance of the decision will lie in the fact that progress can be made on major road construction, there are important consequences for administrative law as

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38 [2012] UKSC 44 at para.148.
39 Including the First Minister.
40 See e.g. the discussion in the story "Is this Scotland's most hated man?" in the *Press and Journal* of 13 September, 2011.
41 [2007] UKHL 29, 2007 SLT 958.
42 Ibid., para.13.
43 Ibid., paras.16-20.
44 Ibid., para.20.
45 [2012] UKSC 31.
46 Ibid., para.29.

well. The guidance on when a further SEA is required as plans develop and change will be of relevance to many plan- and policy-makers, while the comments on the worthiness of this appeal are both a comfort to the litigants and a reassurance for the privileged access to the Supreme Court from Scotland. It is the statements on judicial review, though, which are the most significant. When taken with what was said in *AXA*, it is clear that the Supreme Court wants to see a new and more generous approach to standing in judicial review cases in Scotland, whether at common law or under statutory review procedures. The busybody should still be excluded, but standing should not be used as the way of hiding the more complex balancing of interests that must go on when the courts are considering whether to intervene. What is new here is the emphasis on discretion at later stages as the means of ensuring that the courts strike a balance between allowing challenges to be heard, recognising the existence of legal flaws and intervening in ways which may cause major disruption where little if any real prejudice has been caused by the flaw.

By shifting the focus of the courts' attention, a new approach to judicial review is foreseen, with more explicit recognition of the balancing of interests, the interests both of the parties and of those affected by the consequences of decisions or actions being upheld or struck down. For some judges the exposure of this balancing exercise may be more uncomfortable than presenting difficult decisions as the consequence of technical threshold issues, but it will enable a more open understanding of what is going on and of the courts' role as guardians of the rule of law and of the public interest.

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